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09/521,472	03/08/2000	NOBORU YANAGISAWA	P4982A	1753

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EXAMINER

FISCHER, ANDREW J

ART UNIT	PAPER NUMBER
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3627

DATE MAILED: 04/08/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

09/521,472

**Applicant(s)**

YANAGISAWA ET AL.

**Examiner**

Andrew J. Fischer

**Art Unit**

3627

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 26 January 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-27, 29-36 and 38-42 is/are pending in the application.
- 4a) Of the above claim(s) 1-25, 39, 41 and 42 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 26, 27, 29-36 and 40 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
- 1) ☒ Certified copies of the priority documents have been received.
  - 2) ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - 3) ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>20</u> . | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Acknowledgements*

1. Applicants' first amendment 'C' filed December 5, 2003 (Paper No. 22) was considered non-responsive. A Notice of Non-Compliant Amendment was mailed on January 9, 2004 (Paper No. 23). Applicants' amendment 'C' filed January 26, 2004 (Paper No. 24) is acknowledged and has been entered. Accordingly, claims 1-27, 29-36, and 38-42 remain pending.
2. Claims 1-25, 39, 41, and 42 were withdrawn from further consideration pursuant to 37 C.F.R. §1.142(b) as being drawn to a nonelected invention in the first Office Action on the merits (Paper No. 13), there being no allowable generic or linking claim. Election was made without traverse in Paper No. 11.
3. The Examiner maintains his position as noted in the previous Office Action on the merits<sup>1</sup> that claims 35, 36, and 38 are not patentably distinct from claims 26, 27, and 29-34.
4. This Office Action is written in OACS. Because of this, the Examiner is unable to control formatting, paragraph numbering, font, spelling, line spacing, and/or other word processing issues. The Examiner sincerely apologizes for these errors.

### *Claim Rejections - 35 USC §112 1<sup>st</sup> Paragraph*

5. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

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<sup>1</sup> See the Office Action mailed August 8, 2003 (Paper No. 19).

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6. Claims 26, 27, 29-36, 38, and 40 are rejected under 35 U.S.C. §112, 1<sup>st</sup> paragraph, as failing to comply with the written description requirement. The claims contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Applicants have not disclosed “temporarily storing the advertising information and target purchasing customer information . . . then . . . permanently storing the advertising information and target purchasing customer information . . . .”

If Applicants can show where in their originally filed specification these limitations are found, this particular 112 1<sup>st</sup> paragraph rejection will be withdrawn.

***Claim Rejections - 35 USC §112 2<sup>nd</sup> Paragraph***

7. The following is a quotation of the 2<sup>nd</sup> paragraph of 35 U.S.C. §112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

8. Claims 26, 27, 29-36, 38, and 40 are rejected under 35 U.S.C. §112, 2<sup>nd</sup> paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The scope of the claims is unclear because of the new matter present in the claims. If Applicants can overcome the 35 U.S.C. §112, 1<sup>st</sup> paragraph rejections above, these particular 35 U.S.C. §112, 2<sup>nd</sup> paragraph rejections will also be overcome.

***Claim Rejections - 35 USC §102***

9. The following is a quotation of the appropriate paragraphs of 35 U.S.C. §102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States. . . .

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

10. Claims 26, 27, 29-36, and 38 are rejected under 35 U.S.C. §102(e) as being anticipated by Kanevsky et. al. (U.S. 6,334,109 B1) ("Kanevsky '109"). Kanevsky '109 discloses as previously discussed. Kanevsky '109 also discloses temporarily storing advertising information.

11. Claims 26, 27, 29-36, and 38 are alternatively rejected under 35 U.S.C. §102(e) as being clearly anticipated by Kanevsky et. al. (U.S. 2003/0088463 A1)("Kanevsky '463").

12. Claims 26, 27, 29-36, and 38 are alternatively rejected under 35 U.S.C. §102(e) as being clearly anticipated by Toriyama et. al. (JP 411219481 A).

***Claim Rejections - 35 USC §103***

13. The following is a quotation of 35 U.S.C. §103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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14. Claims 26, 27, 29-36, and 38, as understood by the Examiner, are alternatively rejected under 35 U.S.C. §103(a) as being unpatentable over Kanevsky '109 in view of Dedrick (U.S. 5,724,521). It is the Examiner's principle position that the claims are anticipated by Kanevsky '109 because Kanevsky '109 inherently discloses fee processing for a particular customer.

However if not inherent, Dedrick directly teaches billing advertisers based upon the match to the customer. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Kanevsky '109 as taught by Dedrick to include the fee processes. Such a modification would have allowed advertisers to pay for access to individual customers based on how desirable it is for the advertiser to have access to those particular customers.

15. Moreover, if the server structure was not inherent, it too would have been obvious to one having ordinary skill in the art at the time the invention was made to modify either Kanevsky '109 to include the claimed server structure. It is the Examiner's position that absent evidence of new or unexpected results, it is not inventive in terms of patentability to take one or more servers ( $S_1, S_2, S_3, \dots S_N$ ) which perform one or more tasks ( $T_1, T_2, T_3, \dots T_N$ ) and add (or subtract) an additional number of servers ( $X$ ) to perform all or part of the same tasks by allocating the tasks between the various servers (*i.e.*  $S_1$  and  $S_{N+1}$  perform  $T_1$ ;  $S_2$  and  $S_{N+2}$  perform  $T_2$ ;  $S_3$  and  $S_{N+3}$  perform  $T_3$ ; ... while  $S_N$  and  $S_{N+X}$  perform  $T_N$ ). The prior art is replete with examples showing why such scaling (both increasing and decreasing the number of servers) is desirable.<sup>2</sup>

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<sup>2</sup> See *e.g.* Watson (U.S. 6,223,209 B1) disclosing distributed satellite world wide web servers containing identical information placed strategically throughout the Internet so as to be close to all potential clients to help reduce traffic bottlenecks; Midgely et. al. (U.S. 5,592,611 A)

In other words, a modification increasing the number of servers (e.g. having two servers perform a task previously performed by one server) is analogous to making functions, structures, or actions separable. It is the Examiner's position that when the difference between the claimed invention and the prior art is that the prior art does not disclosed an element as separable, as a matter of law, it would have been obvious to one having ordinary skill in the art to make the element separable. See MPEP §2144.04 V. C. and *In re Dulberg*, 289 F.2d 522, 523, 129 USPQ 348, 349 (CCPA 1961). As noted above, it is desirable to allocate the server tasks to various servers to help reduce bandwidth bottlenecks and to help increase the benefits from economies of scale in addition to offering increased security, excellent data management, fast response, and room for expansion.

After review of the entire record, the Examiner finds that Applicants have not asserted any new or unexpected results regarding their hardware configuration (and the software running their hardware configuration) of their server system. Absent such new or unexpected results, such modifications either increasing or decreasing the number of servers or even reassigning tasks to different server(s) would have helped maintain benefits from economies of scale in

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disclosing additional servers as a stand-in for a failed server so that client service requests are transparent to the user; Kriegsman (U.S. 6,370,580 B2) disclosing multiple servers as secondary web servers to optimize file transfers; Burns et. al. (U.S. 6,298,373 B1) disclosing cache servers which download content during off-peak hours to reduce traffic bottlenecks; Stiles (U.S. 6,219,692 B1) which discloses sending essentially identical tasks to multiple servers with differing processing loads to find the most preferred server provider; Zdepski et. al. (U.S. 5,825,884) disclosing a transactional server for TV networks; *How Networks Work*, Chapter 17 describing how server based structures benefit from economies of scale in addition to offering security, excellent data management, fast response, and room for expansion; and *How the Internet Works*, Chapter 44 implementing a server based architecture in Internet e-commerce.

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addition to offering increased security, excellent data management, fast response, and room for expansion while reducing both operating and capital costs.

16. Claims 26, 27, 29-36, and 38, as understood by the Examiner, are alternatively rejected under 35 U.S.C. §103(a) as being unpatentable over Toriyama in view of Dedrick. It is the Examiner's principle position that the claims are anticipated by Toriyama because Toriyama inherently discloses fee processing for a particular customer.

However if not inherent, Dedrick directly teaches billing advertisers based upon the match to the customer. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Toriyama as taught by Dedrick to include the fee processes. Such a modification would have allowed advertisers to pay for access to individual customers based on how desirable it is for the advertiser to have access to those particular customers.

17. For due process purposes, the Examiner again confirms that Applicants have decided not to be their own lexicographer by indicating and defining claim limitations to have meanings other than their ordinary and accustomed meanings. To support this position, the Examiner again notes the following factual findings as first discussed in the previous Office Actions.<sup>3</sup> First, the Examiner has again carefully reviewed the specification and prosecution history and can not locate any lexicographic definition(s). Second, the Examiner finds that not only have Applicants not pointed to definitional statements in their specification or prosecution history, Applicants have also not pointed to a term or terms in a claim with which to draw in those

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<sup>3</sup> See the Office Action mailed July 25, 2002, Paper No. 13, Paragraph No. 12; the Office Action mailed January 13, 2003, Paper No. 15, Paragraph No. 13; and the Office Action mailed August 8, 2003, Paper No. 19, Paragraph No. 14.



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statements.<sup>4</sup> Third, after receiving express notice of the Examiner's position that lexicography is *not* invoked,<sup>5</sup> Applicants' responses have not point out the "supposed errors" in the Examiner's position regarding lexicography invocation in accordance with 37 C.F.R. §1.111(b) (i.e. Applicants did not argue lexicography *was* invoked). Forth and to be sure of Applicants' intent, the Examiner also notes that Applicants have declined the Examiner's express invitation to be their own lexicographer. Finally, after receiving express notice of the preceding factual findings and conclusions, Applicants' latest response again fails to point out the supposed errors in the Examiner's position regarding lexicography invocation in accordance with 37 C.F.R. §1.111(b). Moreover, Applicants' latest response—while fully considered by the Examiner—does not change the Examiner's conclusion that Applicants have decided not to be their own lexicographer. Therefore (and unless expressly noted otherwise by the Examiner), the heavy presumption in favor of the ordinary and accustomed meaning for claim terminology is confirmed. Accordingly, the claims continue to be interpreted with their "broadest reasonable interpretation," *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997),<sup>6</sup> and the Examiner continues to rely heavily and extensively on this interpretation.<sup>7</sup>

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<sup>4</sup> "In order to overcome this heavy presumption in favor of the ordinary meaning of claim language, it is clear that a party wishing to use statements in the written description to confine or otherwise affect a patent's scope must, *at the very least*, point to a term or terms in the claim with which to draw in those statements. [Emphasis added.]" *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989, 50 USPQ2d 1607, 1610 (Fed. Cir. 1999).

<sup>5</sup> See Note 3.

<sup>6</sup> See also *In re Bass*, 314 F.3d 575, 577, 65 USPQ2d 1156, 1158 (Fed. Cir. 2002) ("In examining a patent claim, the PTO must apply the broadest reasonable meaning to the claim

*Allowable Subject Matter*

18. Claim 40 would be allowable if rewritten or amended to overcome the rejections under 35 U.S.C. § 112, 1<sup>st</sup> and 2<sup>nd</sup> paragraphs, set forth in this Office Action.

*Response to Arguments*

19. Applicants' arguments filed with their amendment in Paper No. 24 have been fully considered but they are not persuasive.

20. Applicant states that "no evidence at all has been offered"<sup>8</sup> to established inherency. The Examiner respectfully disagrees. While Applicants may disagree with the outcome, the statement that "no evidence" has been offered is simply not true. See all documents of record. As noted in the previous Office Action<sup>9</sup>, all factual findings and conclusions of law in this Office Action are based upon the *entire* record. Although the Examiner may have singled out various items of evidence (*e.g.* Kanevsky '109) and expressly noted its content, the other documents of record were also considered and applied when making the Examiner's factual findings and conclusions of law including the Examiner's factual findings on inherency.

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language, taking into account any definitions presented in the specification. Words in a claim are to be given their ordinary and accustomed meaning unless the inventor chose to be his own lexicographer in the specification") (citations omitted); *In re Etter*, 756 F.2d 852, 858, 225 USPQ 1, 5 (Fed. Cir. 1985) (en banc); and MPEP §§ 2111 and 2111.01.

<sup>7</sup> See 37 C.F.R. § 1.104(c)(3) which states in part: "the examiner may rely upon admissions by applicant . . . as to *any matter* affecting patentability . . . [Emphasis added.]"

<sup>8</sup> Applicants' "Remarks" filed with their Amendment 'C', January 26, 2004, Paper No. 24, Page 13, ¶2,

<sup>9</sup> See the previous Office Action, Paper No. 19, Paragraph No. 50.

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21. Applicant also argues that “the specific sequences set forth cannot be reasonably argued as being inherent in any of the prior art references cited.”<sup>10</sup> The Examiner again respectfully disagrees. The “temporarily storing” step occurs when the sales clerk receives the advertisement and sets the advertisement on the counter while continuing with the transaction. The Examiner notes that Applicants have not actually claimed where the information is stored. Next, the “permanently storing” step occurs when the document is actually loaded into the computer system.

22. Applicants’ arguments incorporated by reference have been considered and are also not persuasive.

23. Applicants also discuss Kanevsky ‘109 and attempt to traverse the Official Notice statements on the “grounds set forth in Paragraph A of Amendment B submitted on June 16, 2003 . . . .”<sup>11</sup>

First, the Examiner made the Official Noticed statement in the previous Office Action (Paper No. 19) mailed August 8, 2003. August 8, 2003 is *after* June 16, 2003. So unless Applicants have somehow anticipated their traversal of the *yet to be made* Official Noticed statements, their June 16, 2003 response could not have addressed the Official Notice statements made by the Examiner at a later date.

Yet even assuming Applicants’ extrasensory perception, the Examiner has again reviewed “Paragraph A of Amendment ‘B’ submitted by Applicants on June 16, 2003” and can not locate any such grounds. Moreover, the Examiner can not even locate a mention of the

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<sup>10</sup> Applicants’ “Remarks”, Paper No. 24, Page 13, ¶3.

<sup>11</sup> Applicants’ “Remarks”, Paper No. 24, Pages 13 and 14.

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Officially Noticed facts in their remarks of Amendment 'B.' Applicants attempt at traversing the Official Notice findings as stated in the *previous Office Action* is therefore inadequate.

Adequate traversal is a two step process. First, Applicants must state their traversal on the record. Second and in accordance with 37 C.F.R. §1.111(b) which requires Applicants to specifically point out the supposed errors in the Office Action, Applicants must state *why* the Official Notice statement(s) are not to be considered common knowledge or well known in the art. In this case, while Applicants have clearly met step (1), Applicants have failed step (2) since they have failed to argue *why* the Official Notice statement(s) are not to be considered common knowledge or well known in the art. Because Applicants' traversal is inadequate, the Official Notice statement(s) are taken to be admitted as prior art. See MPEP §2144.03.

To be clear, the Examiner even cautioned and reminded Applicants to review MPEP §2144.03 prior to traversal<sup>12</sup> since adequate traversal was recently added to the latest editions of the MPEP. Nevertheless, Applicants response did not heed the Examiner's advice resulting in the Officially Noticed statements being admitted prior art.

24. In view of Applicants' amendments to claim 50, Applicants' arguments of Walker '329 are considered moot.

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<sup>12</sup> . See the Examiner's Office Action, Paper No. 19, Paragraph No. 8, Note 2; and Paper No. 19, Paragraph No. 51 which expressly stated, "If Applicants disagree with any factual determination or legal conclusion made by the Examiner in this Office Action whether expressly stated or implied,<sup>12</sup> the Examiner respectfully reminds Applicants to properly traverse the Examiner's position(s) in accordance with 37 C.F.R. §1.111(b) in his next response."

### *Conclusion*

25. The following two (2) citations to the Manual of Patent Examining Procedure ("MPEP") apply to this Office Action: MPEP citations to Chapters 200, 700, 1800, and 2100 are from the MPEP 8<sup>th</sup> Edition, Rev 1, February 2003. All remaining MPEP citations are from MPEP 8<sup>th</sup> Edition, August 2001.

26. Because this application is now final, Applicants are reminded of the USPTO's after final practice as discussed in MPEP §714.12 and §714.13 and that entry of amendments after final is *not* a matter of right. "The refusal of an examiner to enter an amendment after final rejection of claims is a matter of discretion." *In re Berger*, 279 F.3d 975, 984, 61 USPQ2d 1523, 1529 (Fed. Cir. 2002) (citations omitted). Furthermore, suggestions or examples of claim language provided by the Examiner are just that—suggestions or examples—and do not constitute a formal requirement mandated by the Examiner. Unless stated otherwise by an express indication that a claim is "allowed," exemplary claim language provided by the Examiner to overcome a particular rejection or to change claim interpretation has *not been addressed* with respect to other aspects of patentability (*e.g.* §101 patentable subject matter, §112 1<sup>st</sup> paragraph written description and enablement, §112 2<sup>nd</sup> paragraph indefiniteness, and §102 and §103 prior art). Therefore, any claim amendment submitted under 37 C.F.R. §1.116 that incorporates an Examiner suggestion or example or simply changes claim interpretation will nevertheless require further consideration and/or search and a patentability determination as noted above.

27. In accordance with the USPTO's goals of customer service, compact prosecution, and reduction of cycle time, the Examiner has made every effort to clarify his position regarding claim interpretation and any rejections or objections in this application. Furthermore, the

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Examiner has again provided Applicants with notice—for due process purposes—of his position regarding his factual determinations and legal conclusions. The Examiner notes and thanks Applicants for their “Remarks” (Paper No. 24) traversing the Examiner’s positions on various points. If Applicants disagree with any additional factual determination or legal conclusion made by the Examiner in this Office Action whether expressly stated or implied,<sup>13</sup> the Examiner respectfully reminds Applicants to properly traverse the Examiner’s position(s) in accordance with 37 C.F.R. §1.111(b) in his next properly filed response. By addressing these issues now, matters where the Examiner and Applicants agree can be eliminated allowing the Examiner and Applicants to focus on areas of disagreement (if any) with the goal towards allowance in the shortest possible time. If Applicants have any questions regarding the Examiner’s positions or have other questions regarding this communication or even previous communications, Applicants are strongly encouraged to contact Examiner Andrew J. Fischer whose telephone number is (703) 305-0292. If attempts to reach the Examiner by telephone are unsuccessful, the Examiner’s immediate supervisor, Robert Olszewski, can be reached at (703) 308-5183. The fax number for facsimile responses is now (703) 872-9306.



Andrew Fischer  
Patent Examiner  
Art Unit 3627

AJF  
March 31, 2004

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<sup>13</sup> E.g., if the Examiner rejected a claim under §103 with two references, although not directly stated, it is the Examiner’s implied position that the references are analogous art.